JUDGMENT

OF THE

COURT OF APPEAL

IN THE CASE OF

SINCLAIR *VERSUS* BAGGE.

PRESENTED TO BOTH HOUSES OF THE GENERAL ASSEMBLY, BY COMMAND OF HIS EXCELLENCY.

WELLINGTON.

—

1867.

COURT OF APPEAL.

WELLINGTON, 24TH JULY, 1867.

PRESENT:

THEIR HONORS MR. JUSTICE JOHNSTON AND MR. JUSTICE RICHMOND.

SINCLAIR (APPELLANT) — BAGGE (RESPONDENT).

This Case was called on for Judgment.

JOHNSTON, J.—This case came before the Supreme Court, at Wellington, by way of appeal from a decision of the District Court of Marlborough, held at Picton; and the hearing was, by order of the Supreme Court, and by consent of the parties, referred to this Court, under the provisions of "The Court of Appeal Act, 1862," section nineteen.

His Honor read the case stated by the parties, as follows:—

CASE.

This is a suit brought by John Bagge, as Clerk of the Board of Works for the town of Blenheim, against James Sinclair, of the town of Blenheim, merchant, to recover the sum of £92 9s. 3s., amount of rates levied upon the lands of the defendant within the town of Blenheim, by the Board of Works for the said town, under an assessment made the 17th day of November, 1865.

By "The Blenheim Improvement Act, 1864" (which Act is to be taken as forming part of this case), a Board of Works was created for the town of Blenheim, under the title of "The Board of Works for the town of Blenheim," consisting of five members.

By the thirteenth section of the Act, the Board is empowered from time to time to levy a rate upon all lands within the town of Blenheim, based upon the estimated value to sell of such lands.

Section fourteen empowers the Board, by writing, under their hands, or of any three of them, to appoint one or more fit person or persons as assessor or assessors to assess such lands, and declares that the assessment to be made shall specify the full and fair value to sell of lands, and the names of the owners and occupiers thereof when known.

The sixteenth section of the Act provides that—

"If any person shall think himself aggrieved by such assessment on the grounds that it includes "any property for which he is not rateable under this Act or that it assesses his rateable property "beyond its full and fair value or that the name or property of any person is omitted out of such "assessment or that the property of any person is assessed below its full and fair value, the person "so considering himself aggrieved may at any time within twenty-eight days after public notice of "such assessment shall have been given as aforesaid notify in writing to the Board of Works the "grounds of his objection to the assessment and his intention to appeal to a Bench of not less than "two Justices of the Peace and shall also send a similar notice to the Clerk to the Resident Magistrate "or Clerk to the Justices who shall thereupon by advertisement in some newspaper generally "circulated in the town of Blenheim summon a meeting of Justices of the Peace for the consideration "of appeals such meeting to be held within fourteen days after the expiration of the aforesaid twenty-"eight days and in case it shall appear that the Appellant is entitled to relief on account of being "erroneously or too highly assessed or that the name or property of any person has been omitted out "of the assessment or that the property of any person is assessed below its full and fair value the said "Court of Appeal shall order the assessment to be altered or amended in such manner as it shall deem "necessary but the assessment shall not be questioned or altered with respect to any other person "named therein and the said Court shall have power to order the costs of such appeal to be paid by "either the Appellant or the Board, and the determination of the said Court of Appeal shall be final "and conclusive."

The Board proceeded to levy a rate; and three members thereof appointed, in writing, the other two members, one being the Chairman of the Board, to be assessors, who assessed the lands of the defendant and prepared the assessment.

The assessors received no consideration for assessing the lands or forming the assessment.

By the forty-seventh section of the Act, "No member of the Board shall during the continuance "of his office become a contractor with or hold any paid office in the gift of the Board."

A meeting of Justices of the Peace was held for the consideration of appeals under the sixteenth section of the Act, and appeals were by such Justices heard and determined, and the assessment was thereupon amended by order of the Justices.

The defendant did not appeal under the provisions of the said Act, and the amendment made in the assessment did not directly affect the lands of the defendant.

The plaintiff, as Clerk of the Board, sues the defendant upon the assessment as amended by the Justices or Court of Appeal. Judgment having been given for the plaintiff, the defendant appeals against such judgment.

The questions for the opinion of the Court are:—

1. Is the appointment of two of the members of the Board as assessors a valid exercise of the powers of appointment under the Act?

2. Is "The Blenheim Improvement Act, 1864," repugnant to an Act passed in the fifteenth and sixteenth years of the reign of Her Majesty, intituled "An Act to grant a Representative Constitution to the Colony of New Zealand;" if so, is the Blenheim Improvement Act void?

3. If the said Act is not void, is the assessment, as amended by the Justices or Court of Appeal, a valid and legal assessment as against the defendant?

JOHNSTON, J., resumed.—The case was argued before my brothers Gresson, J., Richmond, J., Chapman, J., Moore, J., and myself, on the 17th, 18th, and 19th of October, of last year, and we took time to consider. Circumstances to which I need not advert have delayed the Court in delivering judgment.

The Court is unanimously of opinion that its judgment ought to be for the Appellant; but inasmuch as the questions involved are of considerable importance, and there is a diversity of opinion among the Judges as to the grounds on which judgment ought to be founded, it has been considered desirable that the opinion of each of the Judges should be pronounced separately. I shall, therefore, with the assistance of Mr. Justice Richmond, besides stating my own view of the case, read the notes of the opinions of the members of the Court not now present, furnished for the purpose.

It will be found that while the Court is unanimous in support of the appeal, a majority is of opinion that the Provincial Act was *ultra vires;* and a majority, though not composed of the same Judges, consider the rate bad on account of the appointment by the members of the board of two of its own members as assessors.

I proceed to give my own view of the questions raised by the case.

There are two substantial questions. The first one in importance is whether "The Blenheim Improvement Act, 1864," passed by the Provincial Council of Marlborough, is *ultra vires.* The second is whether, supposing the Act not to be *ultra vires*, the appointment by the Board of two of its own members as assessors was invalid, and so invalidated the rate.

With respect to the first of these questions, it is contended first, that the Provincial Council attempt by the Act to constitute or establish a Court such as they are not by law empowered to establish; secondly, that if the tribunal which is to decide appeals against the assessment for the improvement rate is not a new Court, yet a new jurisdiction is given to an old Court beyond the powers of the Provincial Legislature; and thirdly, that the practice of existing Courts is altered by the Provincial Ordinance beyond the powers of the Council.

The powers of Provincial Councils, in respect of legislation, are derived from the eighteenth section of the Constitution Act, (15 and 16 Vict. c. 72), which empowers the Superintendent of each Province, with the advice and consent of the Provincial Council thereof, to make and ordain all such laws and Ordinances "(except and subject as hereinafter mentioned) as may be required for the peace, order "and good government of the Province, provided the same be not repugnant to the law of England."

The exception referred to in that enactment is contained in the following section (the nineteenth), which enacts "It shall not be lawful for the Superintendent and Provincial Council to make or ordain any "law or Ordinance for any of the purposes hereinafter mentioned, that is to say:"

And here follow thirteen different enumerated subjects, of which two have regard to the administration of justice, viz. No. 2 and No. 12. What is prohibited by No. 2 is the "establishment or abolition "of any Court of judicature of Civil or Criminal Jurisdiction, except Courts for trying and punishing "such offences as by the law of New Zealand are or may be made punishable in a summary way, or "altering the constitution, jurisdiction, or practice of any Court, except as aforesaid."

Under the twelfth subsection, the prohibited matter is "altering in any way the criminal law of New Zealand, except as far as relates to the trial and punishment of such offences as are now or may by the criminal law of New Zealand be punishable in a summary way as aforesaid."

But these provisions of the Constitution Act have been modified to a certain extent by "The Provincial Councils Powers Act, 1856," which, though not alluded to in the Case, was necessarily referred to in the argument. That Act, (which was reserved for and received the Royal assent, and came into operation on the 5th of August, 1857,) recites the second and twelfth subsections of the nineteenth section of the Constitution Act, and the power of the General Assembly to alter the provisions of that Act respecting the power of Provincial Councils, subject to reservation for the Queen's pleasure; and enacts first, that it shall be lawful for the Superintendent and Council of any Province to make laws "for altering the civil jurisdiction of any Court of Summary Procedure having jurisdiction in such "Province in all suits or proceedings where the debt or damage claimed shall not exceed twenty "pounds;" secondly, "that the Superintendent and Council of any Province may by any Acts or "Ordinances enact that certain Acts or omissions contrary to the provisions of such Acts or "Ordinances shall be offences within the Province to which such Act or Ordinance shall relate "punishable summarily or otherwise as may thereby be directed: Provided that no felony shall be "thereby created nor any punishment or penalty attached to any such act or omission which shall "exceed six months' imprisonment with hard labour or one hundred pounds sterling in amount for "any one offence."

Taking, therefore, the provisions of the Constitution Act and those of the Act of 1856 together, let us ascertain what are the legislative powers accorded to the Provincial Councils, *i.e.*, what subjects are exempted from the prohibitory language of the nineteenth section of the Constitution Act respecting Courts of Judicature, and what are the prohibitions which remain.

1. As to Courts of Civil Jurisdiction, it would appear that the power of the Provincial Legislature is confined to "altering the civil jurisdiction of any (already existing) Court of Summary "Procedure having jurisdiction in the Province in all suits or proceedings where the debt or damage "claimed shall not exceed twenty pounds."

2. As to criminal jurisdiction, it would appear that the Provincial Legislature has power (1) to create offences, other than felony, punishable summarily or otherwise, provided the punishment or penalty do not exceed six months' imprisonment with hard labour, or £100; and (2) to establish or abolish "Courts of Judicature of Criminal Jurisdiction for trying and punishing offences, punishable

"summarily according to the law of New Zealand, and to regulate the trial and punishment of such "offences."

Such are the powers conferred upon the Provincial Legislatures, subject always to the proviso that they shall be null and void, under section fifty-three of the Constitution Act, so far as they may be repugnant to or inconsistent with any Act of the General Assembly.

The prohibitions by which the powers of the Provincial Legislature, in respect of offences and Courts, are restrained are these:—They are prohibited from changing the criminal law as to creating offences, otherwise than by creating offences within the limits of the Act of 1856, and from creating or abolishing or altering the constitution, jurisdiction, or practice of any Court of Criminal Jurisdiction, except Courts for trying and punishing offences punishable summarily by the law of New Zealand; and they are prohibited from establishing or abolishing any Court of Civil Judicature, or altering the constitution jurisdiction or practice thereof, except in so far as they may alter the civil jurisdiction of any Court of Summary Proceedure having jurisdiction in all suits or proceedings where the debt or damage claimed shall not exceed £20.

Having thus ascertained the extent of the powers and disabilities of the Provincial Courts created by the Imperial Act and the Colonial Act, I proceed to examine the provisions of "The Blenheim Improvement Act, 1864," the validity of which depends upon the question, whether it comes within the powers or the prohibition above defined.

The preamble of the Act recites the expediency of making provisions for making and repairing roads and streets, and other public works, and for draining and otherwise improving and managing the town of Blenheim.

In order to carry out this object, a Board of Works is constituted by the Act, being in the first instance a Board originally constituted by a Provincial Act, called "The Picton Improvement Act "Amendment Act." The vacancies in this Board, after the passing of the Blenheim Act and the reduction of the number below five (5), are to be filled up by the election of persons qualified to vote, by the votes of ratepayers who had paid their rates, at an annual meeting to be held for the purpose, or in certain cases, at a special meeting for the purpose of filling up vacancies.

The chief duties of the Board are to raise and expend a rate for the purposes of the Act.

The rate is to be determined on at a meeting of the Board to be held within a month from the annual election. It is to be made for the following year; it is to be made on the value to sell of the lands within the town, exclusive of any improvement; it is not to be less than one halfpenny nor more than fourpence in the pound.

It is desirable to look at the terms of the fourteenth section more minutely than they are set out in the case, and also to mark the provisions of the fifteenth section.

"14. The Board may from time to time by warrant under their hands or of any three of "them appoint one or more fit person or persons to be assessor or assessors to assess all such "lands and such assessor or assessors shall within thirty days after the delivery to them of the "warrant of their appointment return to the Board an assessment for the said town or such part "thereof as shall be named in such warrant and the assessment shall specify the full and fair value to "sell of all lands exclusive of improvements comprised in such assessment and the names of the "owners and occupiers where known."

"15. When the assessment of the whole town shall have been made or amended to the satisfaction "of the Board the assessor or assessors shall attach his or their names thereto together with the date "of making or amending such assessment and a certificate to the effect that such assessment so made "or amended is a fair and just assessment according to the best of his or their judgment and the "chairman of the Board shall sign the same and in some newspaper or newspapers published or gene-"rally circulated in the Province of Marlborough shall cause public notice to be given and the said "assessment so made or amended may be inspected at the office of the Board of Works for the period "of twenty-one days during the usual office hours by every owner or occupier of property included in "such assessment."

The provisions of the sixteenth section for appealing against the assessment, have already been read at length; the only other section, to the precise terms of which it is necessary to refer is the forty-sixth, respecting the mode of suing and being sued, which though not set out in the case was much discussed at the argument.

"46. The said Board may sue and be sued in the name of their clerk or any member of such Board "for the time being and legal or equitable proceedings taken by or against the Board in the name of "any one of the Board or their clerk shall not abate or be discontinued by the death or removal of such "clerk or member but the clerk for the time being or any member of such Board shall always "be deemed to be the plaintiff or defendant (as the case may be) in any such proceedings Provided "always that the said Board and their clerk respectively shall in no case be personally liable nor shall "the private estate and effects of any of them be liable for the repayment of any moneys or costs or "otherwise in respect of any contracts which shall be made by them or any of them or for any "act deed or matter done or executed by them or any of them in their or his official capacity and on "the public service."

Among the various definitions and distinctions of Courts to be found in the books, I have not met with any one which specifically defines "a Court of Judicature" as distinguished from other courts. I am keenly alive to the danger of attempting definitions of words of so much importance, but I do not well see how one can form any clear opinion on the question with which I am now dealing, without having in one's mind a definite idea of the meaning to be attached to the words in question.

It seems to me that a Court of Judicature might be described as an institution consisting of one or more persons appointed by or through and responsible to the Sovereign power of a State, and authorized by such power, and obliged—on the motion or suggestion (according to duly prescribed forms) of persons claiming the right to set it in motion—to declare and interpret the law of the State if, and as it may be, applicable, and if applicable to apply it, to particular circumstances alleged, (either already ascertained or to be ascertained in manner prescribed by law, either by the Court itself or by some ancillary tribunal). Or, more concisely, it might be said that a Court of Judicature

is a tribunal for the administration of justice by means of an authoritative application of the law to particular cases brought before it by persons claiming to be entitled to its assistance.

Such Courts of Judicature may be limited in their "jurisdiction" (or power of declaring and applying the law to the circumstances), in respect either of the nature of the subject matter, or of the importance of the cases to be submitted to it, as regards the pecuniary amount of the claim, or the gravity of the punishment or penalty to be inflicted, or of the nature of the relief or vindication asked for, or of the locality within which the circumstances have arisen. Now the words used in the nineteenth section of the Constitution Act are, "Court of Judicature of civil or criminal jurisdiction;" and "The Provincial Councils Powers Act, 1856," speaks of the "Civil jurisdiction of a Court of Summary Procedure."

If, therefore, I apply the above tests to the case now before me, the question I have to consider is, whether or not the tribunal or body which the Blenheim Improvement Act empowers to give a final determination as to the justice and equality of the assessment made for the purpose of the rate to be raised according to its provisions, is or is not a Court of Judicature. If it be, there can be no doubt that it is one of civil, and not one of criminal jurisdiction. It is called a Court of Appeal in the Act; and although the use of that denomination might have been insufficient of itself to settle the question as to the intention of the Provincial Legislature, if there had been good reasons *aliunde* for doubting such intention, it is not to be overlooked that the Provincial Council does call it a Court, and a Court of Appeal. Now when we look at the special provisions respecting this Court of Appeal, we find, first, that it is to be set in motion by some person aggrieved by the assessment under the Act,—some one who alleges that he has a right to have the law on the subject applied to the circumstances of his case, inasmuch as the assessment, if unamended, would render him liable to pay a rate founded upon it, though it was unjust and unequal.

In order to get redress, the Appellant has to adopt a prescribed mode of proceedings, notifying within a certain time to the Board of Works his intention to appeal. And the tribunal to which he must appeal—the Court of Appeal—is empowered, *eo nomine*, if it shall appear that the Appellant is entitled to relief on any of the grounds enumerated in the fourteenth section, to give him redress by ordering the assessment to be altered or amended in such manner as it shall deem necessary; and it is further provided that "the said Court" shall have power to order the costs of the appeal to be paid by either the Appellant or the Board; and, furthermore, the determination of the said Court of Appeal is to be final.

Thus we have a tribunal—(to the constitution of which I shall presently advert),—an individual setting it in motion,—a complaint of the violation of a right,—power in the tribunal to consider and finally determine on the circumstances of the particular case,—and further, a power to apply the law and to award redress by alteration or amendment of the instrument which unjustly estimates the charge, and according to which the rate is to be levied,—and a power of adjudicating costs (without limit) in favour of or against the complainant.

The constitution of this Court moreover is not unimportant. It is constituted of a Bench of not less than two Justices of the Peace. Now the word "Bench" has not, as far as I know, any specific technical meaning, but may mean, in popular sense, one or more individuals sitting in a judicial capacity. The Bench in question, however, is not to be an aggregation of Justices casually assembled, or assembled in Petty Sessions, or at any ordinary sitting prescribed by or known to the law, but is a meeting of Justices for the consideration of appeals under this Act, summoned pursuant to a certain notice, and to meet at a certain time. Now although Justices of the Peace have, *virtute officii*, certain judicial duties and powers, those duties and powers are defined by law, and are to be exercised in manner prescribed by law; and Justices may be component parts of different tribunals.

Thus, in England, the General Quarter Sessions of the Peace, the Petty Sessions, and the Special Sessions held under particular Statutes, although all composed of Justices of the Peace, are certainly different courts or tribunals. In New Zealand, Justices may sit together under different authorities in the exercise of different jurisdictions, as for instance,—as Petty Sessions for summary proceedings by way of order and conviction, or as Judges in the civil jurisdiction under the Resident Magistrates' Ordinances and Acts—and in either case, they constitute a Court. Now if the appeal under the Act in question had been given to a Court of Petty Sessions summoned or meeting in the usual way, or to Justices sitting in the exercise of their civil jurisdiction in the ordinary way, it might well have been contended that this Act does not constitute a new Court or tribunal, but merely alters the jurisdiction in respect of subject matter and mode of redress, of an existing one. But the question would then arise, whether the alteration is one of the civil jurisdiction of a Court of Summary Procedure having jurisdiction in all suits or proceedings when the debt or damage claimed shall not exceed twenty pounds. Now, should it be contended that the Justices sitting in the exercise of the civil jurisdiction under the Resident Magistrates' Acts, constitute such a Court, it might be argued in the first place that, so sitting, they have not jurisdiction in all suits and proceedings within that pecuniary limit, there being several cases in which they are expressly prevented by the law of the Colony from acting (as where title to land &c. comes into dispute); and, in the next place, it might I think be conclusively answered, that whatever "the civil jurisdiction" of such Court may be, which it is competent for Provincial Councils to alter, it cannot be the jurisdiction in respect of the pecuniary limit; for, if so, they might get rid of all such limitation, and give the summary tribunal jurisdiction to any amount—which it would seem most improbable that the Legislature should have intended. It may rather be conjectured that the civil jurisdiction which they are to have power to alter is in respect of the nature of the subject matter of complaint or of the remedy to be awarded, and not the pecuniary amount of either. In the Provincial Act under consideration, there is no limit as to the pecuniary extent of the grievance of which the party may complain, or to the amount of costs which may be awarded, or as to the extent to which the Court may alter the assessment. I am of opinion, therefore, that this cannot be called an alteration of the civil jurisdiction of a Court of Summary Procedure, which can be made by virtue of "The Provincial Councils Act, 1856." But I also think that, on the proper interpretation of the local Act, it cannot be held that the appeal is given to any existing tribunal. It seems to me that an attempt is made to erect a new tribunal—a Court of Civil Judicature—within the meaning of the

prohibitions of the nineteenth section of the Constitution Act. The case is not like one of those in which English Statutes give appeals to the already constituted Court of Quarter Sessions; and it seems to me that this is as much a new Court as if it had not been provided that the members of it should be Justices of the Peace.

Having thus disposed of the first two branches of the principal question, I have now to consider the third, namely, whether the Blenheim Act is or is not *ultra vires*, on account of its having attempted, by section forty-six, to alter the practice of Courts which Provincial Councils have no power to interfere with, in violation of the prohibition contained in the second subsection of the nineteenth section of the Constitution Act. Now, the forty-sixth section of the local Act, which professes to provide for the mode in which the Board is to sue and be sued, is not by its terms confined to proceedings in Courts such as the local Legislatures can deal with, but must apply equally to these and to Resident Magistrates' Courts having the extended jurisdiction above £20, to District Courts, and to the Supreme Court.

The section in question provides (though in a clumsy way), first, for a nominal plaintiff or defendant to represent the Board in legal and equitable proceedings; secondly, for the non-abatement or the continuance of the suit, on the death or removal of such nominal party; and, thirdly, for the exoneration of such party or any member of the Board from payment of costs or payment of moneys in respect of any official acts or contracts, out of their private estates. I may mention in passing that I have failed to find any provisions in the Act whereby parties to actions or suits who succeed against the Board, are to obtain execution for costs or damages. But it may be asked, whether it can be contended that the power of suing and being sued in the name of a nominal or official party, and the personal immunity of such party or of the Board, are matters only of the practice of the Courts in which such proceedings are taken. Are they not substantial rights given to the Board for the benefit of the public, and not mere rules of practice in particular Courts? To this I would reply that it seems to me they are, indeed, something beyond mere rules of practice, but also, that they do affect the practice of the Courts above alluded to. With respect to the provision that on the death or removal of the nominal plaintiff or defendant (the clerk or a member of the Board), the suit shall not abate or be discontinued, but such clerk for the time being, or any member (!) shall always be deemed to be plaintiff or defendant, it seems pretty clear that this is a matter of practice. But it may, perhaps, be urged that at all events as regards the Supreme Court, there is no material alteration of the practice, but that the practice enacted is in consonance with the rules (see Supreme Court *Reg. Gen.* 381 and 382) which provide for the substitution of legal representatives after the death of parties, by suggestions on the record; but the answer is that the Blenheim Act does not require a suggestion to be entered, and provides that the clerk for the time being or any member shall be the party; and this clearly seems an alteration in the practice of the Supreme Court. And the same may be said respecting the practice of the District Court. I do not myself see how these provisions in this section of the local Act can be dissevered, and one portion established as valid while another is rejected as being *ultra vires*. The mode of suing and being sued is the matter dealt with in the section, and if the Provincial Legislature in dealing with that has gone beyond its powers in any respect, it seems to me that the whole enactment respecting it is invalid. If that be so, the Appellant must succeed even if the rate was imposed by virtue of enactments not beyond the powers of the Council.

Now, to conclude with respect to this part of the case. If the opinion at which I have arrived, namely, that the provisions for appeal to the Court of Appeal mentioned in the Blenheim Act, are, for both or either of the reasons I have mentioned, beyond the powers of the Provincial Legislature, it seems clear that the rate (which, and not the assessment, creates the charge,) is null and void; and that it cannot be argued with any propriety that the provisions for making and recovering it can be valid, notwithstanding that the prescribed mode of altering and amending the assessment on which it is based, is *ultra vires*, and that the mode of recovery is by means of a practice which the Provincial Legislature had no power to establish.

The power to appeal against the assessment is the only security given by the Act to the inhabitants against an unjust charge; and the Provincial Council evidently did not mean to make them pay a rate until they had had an opportunity of disputing the correctness of the assessment. For these reasons, I am of opinion that the assessment and rate were invalid; and that, at all events, the rate could not be recovered under the powers of the forty-sixth section.

I come now to the second main question of importance in the case, namely, whether the rate or the assessment is void in consequence of the appointment by three members of the Board, of the two other members, to be assessors under the fourteenth section.

A majority of the Judges are of opinion that this mode of appointment invalidated the assessment and rate; but, without going very minutely into this part of the case, I feel bound to state that after having given my best attention to the arguments, and that respectful consideration which is due to the expressed opinions of my brothers Gresson, J., Chapman, J., and Moore, J., I am unable to come to the conclusion at which they have arrived; and that now, as at the hearing of the case, I am by no means satisfied that the appointment was bad, or, at all events, that it was more than an irregularity which did not affect the validity of the assessment or rate. I am not satisfied that the Board had any power granted to them, or any trust vested in them, such as come within the doctrines and practice of Courts of Equity, which some of my learned brethren consider applicable to the case; or that the appointment of assessors was "an execution of a power" or of a "trust" which would subject the Board to the equitable jurisdiction of this Court.

It seems to me that the provision of the Act on this subject merely authorizes the Board to employ, under a warrant, persons whom they may think fit and qualified to perform the work of assessing, that is, describing and valuing the property to be rated, for the purpose of levying the rates, and that too, not conclusively, but subject to investigation and correction by a tribunal having judicial powers.

I think there was no estate or interest in any property vested in the Board, with which they dealt in appointing the assessors; and the assessors got no power over any estate or interest in any property by the appointment. The power and duty of the Board to elect fit persons to assess, and the power and duty of the assessors to make the assessment were, no doubt, powers and duties with moral

obligations attached to them; but I doubt whether the obligations were such as could be subjects of proceedings in a Court of Equity. Perhaps the Board might be liable to a *mandamus*, directing it to appoint assessors, if it neglected to do so; but can it be suggested that proceedings could be taken against the Board as trustees, for a breach of trust in choosing unfit assessors, or for the undue execution of the power of appointing? With regard to the execution by the assessors of their power and trust, it is provided that the incorrectness or irregularity of the assessment is to be the subject of an appeal to which the assessors are not to be the respondent parties, but in which the Board are to pay the costs to successful Appellants.

I was a good deal impressed by the argument arising from the use of the word "satisfaction" in the fifteenth section of the Act; for it does seem at first inconsistent that the Board which is to be satisfied with the assessment should be composed in part of persons with whose action they are to be satisfied; but the inconsistency, I think, would not arise if, as occurs in the present case, there was a majority of three, who could, if dissatisfied, refuse to act upon the assessment of the other two. Moreover, the satisfaction of the Board is not conclusive as to the correctness of the assessment. The assessment is in fact only suggestive, as a basis of the rate, till the time for inspection appeal and amendment has passed.

This kind of appointment may be more or less inconvenient and improper, as the offices of boardman and assessor may be more or less incompatible with each other, under certain circumstances; but it does not follow that it is necessarily invalid: and it is conceded that there is no doubt it would have been competent for the Legislature, if it had chosen, to give the power to the Board to appoint some of its members to the office.

With regard to the question of interpretation of the actual words of the fourteenth section, in the absence of any improbability that the majority of the Board should have power to appoint one or more of its members to do the work of assessors, either on the score of public policy or from a consideration of the context, I confess I do not see any reason why they should be taken to exclude it, if they are capable of including it: and it seems to me that they are.

And now, lastly, I am by no means satisfied that, even if the appointment of the assessors was in this respect irregular, it necessarily follows that the rate would be bad. The assessors do not make the rate; their assessment is open to correction at the instance of any person aggrieved by it; and if not altered on appeal, it may be presumed to be a fair and just one; and if so, it can be a matter of little importance by whom the assessment was made.

But with regard to both the points arising on this part of the case, respecting which I differ from the majority of the Court, I wish to be understood as speaking with some diffidence; and I am glad I am not obliged to base my judgment in favour of the Appellant on them or either of them.

On the whole, then, having come to the conclusion, for the reasons I have stated, that the assessment as amended by the Justices, and the rate were not binding on the Appellant, because the Act assuming to give the Court of Appeal power to alter and amend the assessment was substantially *ultra vires* in respect of matters essential to the validity of the rate and its enforcement, I am of opinion that this appeal must be allowed, and the judgment of the District Court reversed with costs.

GRESSON, J.—In this case three questions have been reserved for the consideration of the Court.

First.—Whether the appointment of the Blenheim Board of Works of two of its members as assessors is a valid exercise of the powers of appointment vested in the Board by "The Blenheim Improvement Act, 1864"?

Secondly.—Whether the Act is repugnant to the New Zealand Constitution Act?

Thirdly.—If the Act be not void, whether the assessment as amended by the Justices is a valid and legal assessment against the Appellant?

I propose to consider the second question first.

In order to determine whether or not the Blenheim Act is *ultra vires*, we must consider its provisions in connexion with the New Zealand Constitution Act as modified by "The Provincial Councils Powers Act, 1856," which latter Act, although not referred to in this case, must, for the determination of this question, be considered as forming part of it.

The Constitution Act prohibits Provincial Councils from making laws for the establishment of any Court of Civil or Criminal Jurisdiction, except Courts for trying such offences as by the law of New Zealand are or may be made punishable in a summary way, and from altering the constitution, jurisdiction, or practice of any such Court as aforesaid.

I think that the sixteenth section purports to establish a Court of Civil Jurisdiction. It designates the tribunal, which it specifies as a Court of Appeal, and we are bound to give to the language used its ordinary construction, unless we gather from the Act itself that it was not the intention of the Legislature so to use it; and I do not find anything in the Act from which it can be inferred that the terms used are not to be understood in their ordinary sense.

The only civil jurisdiction exercised by Justices of the Peace sitting as a Court is that which they derive from the Resident Magistrates' Courts Ordinance; and it is restricted to claims of debt or damage not exceeding £20, and obviously falls very far short of such questions as the Court constituted by the Blenheim Act might have to determine, involving, amongst others, questions of title to land, from the taking cognizance of which the Justices are expressly prohibited by "The Resident Magistrates' Courts Amendment Ordinance, 1856."

"The Provincial Councils Powers Act, 1856," empowers Provincial Councils to make laws for altering the civil jurisdiction of Courts of Summary Procedure having jurisdiction in the Province in all suits or proceedings where the debt or damage claimed shall not exceed £20.

If it be contended that the Blenheim Act does not constitute a new Court, but only gives to one already constituted an altered jurisdiction, such as is authorized by the last-mentioned Act, I answer that such a construction assumes that the Provincial Councils Powers Act enables Provincial Legislatures to enlarge indefinitely the jurisdiction of Justices of the Peace, a construction that is quite inconsistent with the provisions of "The Resident Magistrates' Courts Amendment Act,

1856," which was passed immediately before, and which restricts the jurisdiction of the Justices within narrower limits than those assigned by the Resident Magistrates' Ordinance from which their jurisdiction is derived.

Being of opinion that the Blenheim Act is *ultra vires*, for the reasons I have mentioned, it becomes unnecessary to decide the other questions submitted for our consideration. I may state, however, that I retain the opinion entertained by me at the hearing, that the appointment by the Board of two of its members as assessors was not a valid exercise of the powers vested in it by the Act. The mode of appointment provided by the Act (s. 14.), viz., by warrant under the hands of the members of the Board, to be delivered to the appointees, seems to me inconsistent with the supposition that the appointors and appointees may be the same persons. Still more so, the provisions of the fifteenth section, requiring that the assessment shall be made or amended to the satisfaction of the Board and signed by the chairman before it can be inspected.

If the Legislature attached any value to the approval of the Board, (and that it did, I think may be assumed from the fact of its requiring the assessment to be so approved before being submitted for public inspection), it is plain that such approval, where the assessors and members of the Board are the same persons, adds nothing to the force of the certificate of the assessors. The offices of assessor and member of the Board therefore, appear to me to be incompatible.

RICHMOND, J.—I concur with my brothers Johnston, J., and Gresson, J., in holding that the sixteenth section of the Blenheim Improvement Act is *ultra vires*.

In the first place, it is clear that the enactment of the sixteenth section is not within the exceptional class of cases in which Provincial Legislatures may establish Courts and alter jurisdictions. The question then is, can the section be understood otherwise than as purporting to establish a Court of Judicature? The section affects, in terms, to establish a Court which it calls a Court of Appeal. Is this institution which the Ordinance pretends to establish really a Court of Judicature; that is, would the institution be such, if the enactment were valid?

I shall at once assume that any public body authorized to give judicial decisions is a Court of Judicature. The question is then narrowed to the inquiry, whether the decisions of the Justices under the sixteenth section would be judicial decisions?

The essential characteristics of a judicial decision appear to be—First, that it is always given in a litigation of some sort. Lord Mansfield says (in *Medhurst v. Waite*, 3 Burrows, 1,259) that a judicial act is always supposed to be done *pendente lite;* secondly, that it is authoritative, being in general considered binding upon parties and privies, and in some cases upon all the world. Tried by these two tests, the decisions of Justices under section sixteen, would plainly be judicial acts, for the section supposes a litigation closed by a judgment. This conclusion might even seem too plain for argument; yet it is desirable to point out in what particulars the functions of the Justices are distinguishable from those of assessors. These latter have, in the execution of their duty, to determine upon the same questions of value and rateability as may afterwards, on appeal, come before the Justices; but it will be perceived that their decisions are wanting in both the qualities of judicial determination which I have indicated.

I conclude that the sixteenth section cannot be understood otherwise than as illegally affecting to establish a Court of Judicature.

I am further of opinion that the forty-sixth clause is *ultra vires*.

The Provincial Legislatures cannot alter the practice of the superior Courts of the Colony. They cannot therefore confer on natural persons or bodies politic the right of appearing in those Courts as litigants otherwise than in the usual mode—otherwise, that is, than in their own names. Litigation in the name of a person who is a complete stranger to the cause of action is not a usual mode. The case of actions at law brought by a trustee is of course very different, the whole legal interest being in the plaintiff. Nominal or representative plaintiffs, when admitted to sue, are admitted (as in the case of Superintendents of Provinces under "The Provincial Lawsuits Act, 1858") by virtue of special Acts of the General Assembly. There is no general rule of practice recognizing such a class of plaintiffs; and although enactments authorizing suits by nominal plaintiffs are familiar to the courts, yet every fresh provision of this kind is a fresh exception to the general rule of practice which prescribes the appearance as plaintiff of the very party to whom the cause of action has accrued.

So much on the assumption that the provision for suing by the Clerk is separable from the provisions (on the argument admitted to be quite indefensible) which follow. Those provisions, however, in my opinion, are not separable from the former part of the clause. If separable, the provisions respecting abatement being void, the right to proceed in an action in the Supreme Court, or to revive a judgment, would on the death of the nominal plaintiff, vest in his personal representative (*Regulæ Generales*, 381, 368), results plainly not intended by the Provincial Legislature, and in all probability substantially objectionable. The intent, therefore, is not better served by rejecting a part of the enactment than by holding, as I do, the whole to be void.

I wish to add, that had the respondent been appointed under section nineteen to receive the rate, the case would have been open to a different consideration on this head.

I have been compelled to express an opinion on the validity of the Ordinance, because I continue to feel some doubt whether the objection which weighs so much with some Members of the Court relative to the appointment by the Board of two of its members to be assessors is sustainable.

On the argument it was attempted to liken the case to that of the donee of a power to appoint new trustees, exercising the power by appointing himself; and it was assumed that such an appointment would in all cases be bad.

This assumption, in the first place, does not appear to be quite well founded. There seems to be no decided case on the subject, and Mr. Lewin, in his work on Trusts, p. 432, does no more than say that, "the question is often asked, whether the donee of the power can appoint himself a trustee?" expressing at the same time his own opinion that such an appointment would be, in general, open to objection. In the second place, the present question is, not whether persons entrusted with the power of selecting fitting agents for a particular public duty, can appoint themselves, or can concur in such an appointment,

but whether persons so entrusted can be appointed by a quorum of their colleagues. But, lastly, the supposed analogy appears to be quite mistaken. An argument founded upon the principles of equity in regard to trusts of property is surely out of place in a case of this nature. The only precedents at all in point are those relating to municipal appointments. Section forty-seven of the Ordinance makes it clear that there is no general objection to the appointment by the Board of its own members to offices in its gift. It may be argued that this section impliedly permits such appointments to any *unpaid* office.

The only argument against the appointment in which I can see the least weight, is that the functions of Boardman and Assessor are incompatible. According to the analogy of the English cases on corporate offices this objection would not vitiate the appointment to the assessorship, but would vacate the seat of the Boardman who accepted the appointment. *Millward v. Thatcher*, 2 Term Reports, 81; *The King v. William Pateman*, ib. 777. The result as to the validity of the assessment might, however, as pointed out by Mr. Justice Chapman, be the same.

I agree that under section fifteen the Board appears to possess some supervising power over the assessment; and hence it may be deduced that the public security for a just assessment is impaired by the union in one and the same individual of the powers of assessor and member of the Board. Looking, however, to the doubtful nature of this control over assessment which the Board possesses, and to the terms of section forty-seven, this ground does not appear to me very sure, and I prefer to base my judgment on the other grounds of objection rather than upon this one.

CHAPMAN, J.—This is an appeal to the Supreme Court at Wellington, and referred by the learned Judge, with the consent of the parties, to this court. The facts have been already stated by Mr. Justice Johnston. It has been contended on behalf of the Appellant (the defendant in the Court below), that he ought to have had judgment on two distinct grounds, either of which was sufficient to invalidate the rate imposed by the Board of Works at Blenheim. These grounds are:—(1.) That the nominal plaintiff, the Clerk of the said Board, had no *locus standi* to sue at all, inasmuch as the forty-sixth section of the local Act under which the rate was made, is *ultra vires*, as affecting or altering the practice of the Supreme Court—one of the subjects of legislation forbidden to Provincial Councils by the nineteenth section of the Constitution Act: (2.) Assuming that the forty-sixth section is not *ultra vires*, that then the rate itself is invalid inasmuch as the instruction of the local Legislature has been violated by the improper mode of appointing the assessors under the fourteenth section of the local Act.

Assuming for the present the validity of the local Act, I propose to consider the second ground of appeal first. The fourteenth section of the local Act authorizes the Board "from time to time "by warrant under their hands or the hands of any three of them to appoint one or more fit person or "persons to be assessor or assessors to assess all lands, &c." In pursuance of this authority, the Board appointed two of their own members to be assessors, for the purpose of making a valuation of lands liable to the rate. It is contended that, by appointing some of themselves assessors, the Board has not effectually exercised the authority conferred upon them, and, therefore, that the rate founded on the valuation of the assessors so appointed is bad. This view I think correct, though it is not without reluctance that I have arrived at a conclusion which must disturb the arrangements of the Blenheim Board of Works. All authority, whether given by a Statute or by a private person, must be strictly pursued. In order to determine whether this has or has not been done in the case before us, we must ascertain the intention of the local Legislature from the language which it has employed. Taking the common use of language, I think it must be obvious, that where a body of men is empowered to elect or appoint another body of men, with functions differing from but ancillary to its own, the Legislature could not have intended that they should or contemplated that they would appoint some of themselves. It seems to me, that if the local Legislature had so intended, some such words as "shall elect or appoint out of their own body one or more assessor or assessors, &c." would have been employed. That such enabling words have not been used, seems to me to afford a presumption—and by no means a weak one—that such was not the intention of the local Legislature. When we look at the functions of the two bodies, that is the distinct acts which each has to perform, I think that the presumption is greatly strengthened, or rather is converted into certainty. It is the Board of Works which is empowered to make the rate, and they do so upon a valuation to be made by the assessors; and it seems to me that the ratepayers are deprived of an important security intended by the Legislature, if the valuing body is identical with the rate-making body, instead of being distinct, independent, and indifferent. The two functions are distinct, though the one be preliminary to the other, and that distinctness is inseparable from the intention of the Legislature, and if it be lost by making the two bodies coalesce, that intention is defeated. It is, indeed, the fact of the same individuals continuing to exercise both functions, and not the mere circumstance of the appointment which seems to me to constitute the fatal vice of the proceeding. In England, if one of the members of a Municipal Corporation be chosen to fill an incompatible office, the election is not void, but his seat as a member is vacated. If that had been done here, I am not aware that the appointment itself could have been deemed invalid; but the assessor has continued to act as a member of the Board, and that, I think, vitiates the act of the Board. I do not say that the appointment was invalid. We are not called upon to decide that; it is no part of the case. What we are required to determine is, the act of a body constituted as described, that is the rate.

As this disposes of the case in favour of the Appellant, it is unnecessary to go into the other principal ground of appeal; but as it has been raised and very fully argued, I will not abstain from expressing my views on the subject. I am inclined to think that the objection cannot be supported. I think the forty-sixth section is divisible. The first portion is as follows:—"The said Board may "sue and be sued in the name of their Clerk or of any member of the Board for the time being." I see no alteration or invasion of the practice of the Supreme Court in this. The local Legislature furnishes to the Court a plaintiff whom it can accept in accordance with its practice; and therefore the enactment so far is not *ultra vires*. But in all that follows, the practice of the Court is altered and invaded at every point; yet that portion of the forty-sixth section does not come into question in the

case before us. In the only part of the section which does come into question in this Act, namely, the place of Mr. Bagge on the record, I think there is no violation of the Constitution Act. It has been suggested by one of my learned brothers, that the two parts of the forty-sixth sections cannot be separated, because the first part does not give the Court a plaintiff absolutely and unconditionally, but only a plaintiff clogged with the incidents and conditions named in the latter part of the section. I was at first much impressed with this view, but on a very careful reading of the sections, I recur to my original opinion, namely, that the early part of the section is divisible from the latter portion, and is not *ultra vires*. I think that Acts of the Provincial Legislatures should be sustained by the Courts, unless they are clearly repugnant to the nineteenth section of the Constitution Act, and that they should never be pronounced invalid to a greater extent than is necessary to eliminate the vicious portion.

MOORE, J.—This is an appeal from the District Court of Marlborough, holden at Picton, to the Supreme Court at Wellington, and, by consent of the parties, ordered to be heard before this Court.

After the judgments which have been given, it is unnecessary to state again the facts of the case.

The questions for the opinion of the Court are:—

1. Is the appointment of two of the members of the Board as assessors a valid exercise of the power of appointment under this Act?
2. Is "The Blenheim Improvement Act, 1864," repugnant to an Act passed in the fifteenth and sixteenth years of the reign of Her Majesty, intituled "An Act to grant a Representative Constitution to the Colony of New Zealand;" if so, is the Blenheim Improvement Act void?
3. If the said Act is not void, is the assessment as amended by the Justices, or Court of Appeal, a valid and legal assessment as against the defendants?

If the case is to be treated as one of the execution of a power, or analogous thereto, then I think, upon every principle upon which, according to my understanding of the matter, the Court acts in such cases, the appointment referred to in the first question is not a valid exercise of the power of appointment under the Act. If the case is to be treated rather as one of the performance of a trust, or as analogous thereto, than of the execution of a power, then also, I think, upon every principle upon which the Court, according to my understanding of the matter, acts in such cases, the appointment in question was not a due performance of the trust. If, again, the case is to be treated as one in which interest and duty conflict, or may conflict, then also I think the appointment in question cannot be supported. To cite authorities for these things would be simply to transcribe so much of the treatises on powers and the law of trusts, respectively, as relates to these matters.

If, however, the case is not to be treated as a case of the execution of a power, nor as a case of the performance of a trust, nor as a case in which interest and duty conflict, or may conflict, but rather as a case of construction—simply construction—that is, of the sections of the Blenheim Act in question bearing upon the subject matter of appeal, then, I take it, the question is, what was the intention of the framers of the sections in question? Now, the intention is in all cases to be gathered from the language—the words in which the intention is expressed. I need not repeat the sections here. But if the intention of those who framed these sections had been that the Board itself should or might assess, what could have been easier than to have said so? If, again, the intention had been that the Board itself should or might assess, or, in the alternative, should or might appoint assessors, what could have been easier than to have said so? If, once more, the intention had been that the Board should or might appoint themselves, or any two or more of themselves, as assessors, nothing could have been easier, apparently, than to have said so; however absurd, or, if not absurd, at least unnecessary, such a proceeding may appear. None of these things, however, is said; on the contrary, language is used in the fifteenth section to express the intention of the users, which, as I read it, clearly shows their intention to have been that the Board and the assessors should be different and distinct persons, with distinct and separate functions. I therefore think that the first question must be answered in the negative. This makes it unnecessary for the decision of the case to give an answer to the second question. And I confess to not having considered it so as that I must be held bound on any future occasion on which it may arise and be necessary to the decision of the case to give an answer to it by such answer as I give now, which is, that, as it seems upon the authorities, that such an enactment as the forty-sixth section of the Blenheim Act is divisible, the Act is not repugnant to the Constitution Act; though I am not to be understood as saying that, but for such divisibility, it would be so repugnant. The third question must necessarily, if the first be answered in the negative, be also so answered; and the appeal, I think, should be allowed, with costs.

Appeal allowed; and judgment of the District Court reversed; with costs.